

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

OWEN ELECTRIC COOPERATIVE, INC.

ALLEGED FAILURE TO COMPLY WITH
COMMISSION REGULATIONS 807 KAR 5:006
AND 807 KAR 5:041

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) CASE NO. 93-145
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O R D E R

This case arises out of an accident involving the facilities of Owen Electric Cooperative, Inc. ("Owen Electric"). It presents the following issues: (1) Does a utility violate Commission Regulation 807 KAR 5:041, Section 3, when a contractor, who it retains to construct and maintain its facilities, fails to comply with acceptable standards? and (2) May a utility be penalized for the acts of a contractor? Finding that Commission Regulation 807 KAR 5:041, Section 3, imposes a nondelegable duty upon an electric utility to construct and maintain its plant and facilities in accordance with the National Electrical Safety Code ("NESC") and that KRS 278.990(1) imputes a contractor's failure to comply with the NESC to the contracting electric utility, the Commission assesses a penalty of \$500 against Owen Electric.

PROCEDURE

The Commission initiated this proceeding on May 13, 1993 after receiving an Electrical Utility Accident Investigation Report in which its Staff found that Owen Electric had violated Commission regulations. Contending that no legal or factual basis for the

Commission's action existed, Owen Electric moved for dismissal. The Commission deferred ruling on this motion and instead ordered a hearing. It also granted¹ the motions of Jackson County Rural Electric Cooperative Corporation and Jackson Purchase Electric Cooperative Corporation to consolidate Cases No. 93-043² and 93-044³ with this case for the purpose of hearing evidence and argument on certain legal issues. The Commission held hearings in this matter on December 1 and 2, 1993.⁴

FACTS

Since 1984 Owen Electric has contracted with Richardson Contracting, Inc. ("Richardson Contracting") for electrical construction services including the construction, rebuilding, and retirement of overhead electrical distribution lines. On September 25, 1992, a Richardson Contracting crew was tasked to upgrade an existing Owen Electric three phase line on Kentucky Highway 17 in Pendleton County, Kentucky. While working on this line, Richardson Contracting employee Kenneth Peters came into contact with a 7200 single phase tap line and was electrocuted.

¹ Orders of July 14, 1993 and September 2, 1993.

² Case No. 93-043, Jackson County Rural Electric Cooperative Corporation, Inc. - Alleged Failure to Comply with Commission Regulations 807 KAR 5:006 and 807 KAR 5:041.

³ Case No. 93-044, Jackson Purchase Electric Cooperative Corporation, Inc. - Alleged Failure to Comply with Commission Regulations.

⁴ The following witnesses testified: John Land (Utility Investigator, Public Service Commission), Frank Downing (General Manager, Owen Electric Cooperative), Danny Stockdale (Superintendent of Engineering, Owen Electric Cooperative), Amanda Storment (Director, Division of Compliance - Kentucky Occupational Safety & Health Program), Mary J. Davis (Professor, University of Kentucky Law School), Edmund V. Bell (Vice President-Claims, Federated Rural Electric Insurance Corporation), and Johnny B. Dagenhart (Consultant, Clapp Research Associates).

At the time of incident, Peters was not wearing rubber gloves as required by NESC Section 441A and Owen Electric safety rules nor had he covered the energized facilities within his work area with a protective covering. Moreover, in violation of NESC Section 421 (421A), the first level supervisor had failed to enforce the NESC and local work rules and had departed the work area before the incident.

ISSUES

Does a utility violate Commission Regulation 807 KAR 5:041 when a contractor, who it retains to repair and maintain utility facilities, fails to comply with NESC standards?

Commission Regulation 807 KAR 5:041, Section 3, states:

A utility shall construct and maintain *its plant and facilities* in accordance with good accepted engineering practices. Unless otherwise specified by the commission, *the utility shall use applicable provisions in the following publications as standards of accepted good engineering practice for construction and maintenance of plant and facilities*, herein incorporated by reference: . . . National Electrical Safety Code [bold italics added].

While conceding that Peters violated the NESC, Owen Electric argues that no violation of Commission Regulation 807 KAR 5:041 occurred. The regulation, it contends, applies to utilities and their employees only. Owen Electric notes that in this case its employees neither violated NESC standards nor were present at the accident. It further notes that its contract required Richardson Contracting to comply with NESC standards.

Owen Electric further argues that Commission Regulation 807 KAR 5:041, Section 3, neither regulates the conduct of a utility's contractors nor requires a utility to "police the activities of its independent contractors." Motion to Dismiss at 5. Citing several court

decisions, including King v. Shelby Rural Electric Cooperative Corp., Ky., 502 S.W.2d 659 (1973), it asserts that no statute or administrative regulation imposes such a duty. As a utility currently has no obligation to police its contractors, holding it liable for its contractor's failure to comply with the NESC would be imposing new duty. Such action, Owen Electric asserts, is a legislative act beyond the Commission's authority.

Owen Electric's arguments are not persuasive. Virtually all of its supporting authority involves workers compensation cases rather than the enforcement of a statute or administrative regulation. In each case, an independent contractor's employee sought damages from a utility for job-related injuries. Each case focused on policy issues involving the purpose and intent of workers compensation statutes. The delivery of safe and adequate utility service to the public was not an issue.

Owen Electric has failed to support its underlying argument that a utility may delegate to its contractors its legal duty to construct and maintain its facilities in accordance with NESC standards. The literal language of Commission Regulation 807 KAR 5:041, Section 3, which requires the construction and maintenance of utility facilities in accordance with NESC standards, suggests the contrary. The duty runs with the ownership of the utility plant and facilities, not with who performs the actual work. This duty is not new, but has existed in some form for many years.

KRS 278.030(2) and KRS 278.280(2) support this view. KRS 278.030(2) provides that "[e]very utility shall furnish adequate, efficient and reasonable service" The delivery of safe service is synonymous with "adequate" and "reasonable" service. KRS

278.280(2)⁵ requires that the utility provide "adequate and reasonable" service in accordance with Commission regulations. Commission Regulation 807 KAR 5:041, Section 3, which is promulgated pursuant to KRS 278.280(2), requires that service be provided through facilities constructed and maintained in accordance with the NESC.

In Snyder v. Southern California Edison Co., 285 P.2d 912 (Cal. 1955), employees of an independent contractor brought actions against an electric utility for injuries caused by the fall of a power pole negligently set by the utility's contractor. They argued that the utility's independent contractor had failed to set the utility poles in accordance with the regulations of the California Public Utility Commission ("CPUC"). The utility argued that the pole in question was set improperly by an independent contractor and that, in the absence of instructions by the utility to the contractor to set the pole improperly, the utility had breached no duty owed to the public. Rejecting this argument, the California Supreme Court held that a utility's duty to comply with CPUC regulations was nondelegable and could not be evaded through the use of independent contractors.

Disputing the existence of any non-delegable duty, Owen Electric points to the holding of Tauscher v. Puget Sound Power & Light, 635 P.2d 426 (Wash. 1981). In Tauscher, the estate of an independent contractor's employee brought a wrongful death action against a public electrical utility. It argued, inter alia, that the utility owed a

⁵ KRS 278.280(2) states:

The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by the utility, and, on proper demand and tender of rates, the *utility shall furnish the commodity or render the service within the time and upon the conditions provided in the rules* [bold italics added].

nondelegable duty to employees of the utility's independent contractors to ensure compliance with certain safety statutes and regulations. While noting that "[a] statute may create the nondelegable duty of providing safeguards or precautions for the safety of 'others'" and that "administrative rules may impose nondelegable duties as do statutes," Id. at 431-432, the Supreme Court of Washington found that the statutes and regulations at issue did not. The Court relied heavily on the absence of any specific language which suggested that "public utilities must guarantee that employees of independent contractors comply with the [statutory or administrative] safety standards."

The facts of Tauscher, however, are distinguishable for several reasons. First, no Kentucky statute or administrative regulation expressly precludes the creation of a nondelegable duty. Second, the court in Tauscher declined to find the existence on a nondelegable duty because of the wide scope of persons to which the statute and regulations applied. Unlike the Washington statute and administrative regulations which impose a duty on all employers - utilities and independent contractors - engaged in electrical construction, Commission Regulation 807 KAR 5:041 focuses only on utilities and their facilities. Third, unlike the Washington statute, KRS 278.280(2) expressly provides that a utility provide service in accordance with Commission regulations.

Owen Electric also argues that policy reasons militate against the imposition of a nondelegable duty. It argues that, if Commission Regulation 807 KAR 5:041 requires electric utilities to be responsible for the actions of independent contractors, they will be exposed to additional tort liability and incur increased insurance premiums. A higher cost of service is likely.

A finding of a nondelegable duty, however, does not necessarily expose electric utilities to greater tort liability. Currently all persons, except the employees of independent contractors, may bring a tort action against a utility for injuries due to an independent contractor's failure to comply with safety rules. King precludes independent contractor employees from bringing such actions. The cooperative's expert witness testified that, while a finding of a nondelegable duty may increase an electric utility's exposure to such actions, the policy reasons set forth in King could still preclude them.⁶

Finally, the public safety must be considered. Electrical transmission and distribution lines are inherently dangerous. See e.g., Kirschner v. Louisville Gas & Electric Co., Ky., 743 S.W.2d 840, 845 (1988) ("High-voltage electricity is dangerous."); Black v. Public Ser. Elec. & Gas Co., 265 A.2d 129, 133 (N.J. 1970) ("An uninsulated high voltage power line carrying a deadly current must be considered one of the most dangerous contrivances known to man."). Electrical utilities, furthermore, have long been required to operate their facilities with the highest degree of skill and care. Vaught's Administratrix v. Kentucky Utilities Co., Ky., 296 S.W.2d 459, 461 (1956) ("In constructing and maintaining electrical lines the highest degree of caution must be exercised for the protection of all persons . . ."). Permitting an electric utility to delegate its duty to properly construct and maintain its facilities reduces the electric utility's incentive to ensure that its facilities conform to acceptable standards and encourages it to deemphasize safety.

⁶ Transcript, Vol. I, at 106 - 107.

May a utility be penalized for the acts of its contractors?

KRS 278.990(1) states:

If any utility ***willfully*** violates any of the provisions of this chapter or any regulation promulgated pursuant to this chapter, or does any act therein prohibited, or fails to perform any duty imposed upon it under those sections for which no penalty has been provided by law, or fails to obey any order of the commission from which all rights of appeal have been exhausted, the utility shall be subject to a civil penalty to be assessed by the commission for each offense not less than twenty-five dollars (\$25.00) nor more than two thousand five hundred dollars (\$2,500). ***Each act, omission, or failure by an officer, agent, or other person acting for or employed by a utility and acting within the scope of his employment shall be deemed to be the act, omission, or failure of the utility.*** [Bold italics added.]

Owen Electric argues that no willfull violation of a Commission regulation has occurred. It contends that it had no control over the actions of its contractors and further contends that "[t]he conduct of a third party over which a utility has no control cannot as a matter of law constitute willfull conduct as the term has been defined by the courts and Legislature." Motion to Dismiss at 2.

"Willfull" has been defined in several different ways. In large measure, the definition depends on the particular facts of the case. In U.S. v. Murdock, 290 U.S. 389 (1933), which involved a violation of a criminal statute, the U.S. Supreme Court gave the following definition:

The word often denotes an act which is intentional, or knowing, or voluntary as distinguish from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct

marked by careless disregard whether or not one has the right so to act.

Id. at 394-395 (citations omitted).

For civil and administrative proceedings, "willfull conduct is most often defined simply as that which is intentional, rather than inadvertent or accidental." Hager v. D. of C. Dept. of Cong. & Reg. Affairs, 475 A.2d 367, 368 (D.C.App. 1984). For example, in Woods v. Corsey, 200 P.2d 208 (Cal.App. 1948), which involved a civil violation of the Emergency Price Control Act, the California Court of Appeals found that a willfull violation was "one which is intentional, knowing, voluntary, deliberate or obstinate, although it may be neither malevolent nor with the purpose to violate the law." Id. at 211. Similarly, in Nuger v. State Insurance Commissioner, 207 A.2d 619 (Md. 1965), which involved an appeal of an administrative agency's revocation of two insurance agents' licenses for willfully violating insurance statutes, the Maryland Court of Appeals declared "willfull violation" to mean "an intentional act of omission or commission." Id. at 625.

In Kentucky, "[t]he word 'willfull' in its generally acceptation means intentionally, not accidentally nor involuntarily." Muncy v. Commonwealth, 97 S.W.2d 606, 609, 265 Ky. 730 (1936). Proof of ill will is not a requisite element of willfullness. Louisville & N. R. Co. v. George, 129 S.W.2d 986, 989, 279 Ky. 24 (1939). Consequently, no evidence of ill will, evil intent, or malice is necessary to prove that an act was willfully performed.

In Huddleston v. Hughes, Ky.App., 843 S.W.2d 901 (1992), the Court of Appeals recently interpreted the term "willfull" as used in the Kentucky Recreational Use Statute (KRS 411.190). After reviewing various usages of the term, the Court concluded that the term "willfull" does not "necessarily and solely entail an 'intention to do wrong and inflict an

injury," but may also include conduct which reflects an "indifference to . . . [its] natural consequences."

The record of this case indicates that both Richardson Contracting and Peters intended to commit the acts which constitute NESC violations. The Commission considers such conduct to be "willfull."

Given that KRS 278.990(1) expressly provides that the failure of any person acting for a utility shall be deemed the failure of the utility and that Peters and Richardson Contracting were performing a non-delegable duty on Owen Electric's behalf, their conduct is imputed to Owen Electric and subjects the utility to the imposition of a civil penalty.

FINDINGS OF FACT

1. Owen Electric is a Kentucky corporation which owns and operates facilities used in the distribution of electricity to the public for compensation for light, heat, power, and other uses.

2. Owen Electric is formed under the provisions of KRS 279.010 to KRS 279.220.

3. Richardson Contracting has provided electrical construction services for Owen Electric since 1984. These services included the construction, rebuilding, and retirement of overhead electrical distribution lines.

4. On August 23, 1990, Richardson Contracting entered into a contract ("the contract") with Owen Electric to construct and install certain utility plant.

5. The contract provides, inter alia, that:

a. Richardson Contracting's manner of performance of work and equipment are subject to Owen Electric's inspections, tests, and approvals.

b. Richardson Contracting take all reasonable precautions for the safety of the public and employees at the work site, and comply with all applicable provisions of federal, state, and municipal safety laws and building and construction codes, as well as Owen Electric's safety rules and regulations.

c. Richardson Contracting maintain public liability and property damage liability insurance.

d. Richardson Contracting comply with all applicable statutes, ordinances, rules and regulations pertaining to the work.

7. On September 25, 1992, Richardson Contracting was upgrading an existing three phase line on Kentucky Highway 17 in Pendleton County, Kentucky.

8. While working on this project, Richardson Contracting employee Kenneth Peters came into contact with a 7200 volt single phase line tap on the utility on which he was working. At the time of the incident, the 7200 volt single phase line had not been de-energized nor had the single phase tap line been covered with rubber protective equipment.

9. At the time of the incident, Peters was not wearing rubber gloves.

10. At the time of the incident, the foreman of the Richardson Contracting crew was not at the work site and was neither enforcing all applicable safety rules nor taking such precautions as were within his authority to prevent accidents.

11. At the time of the incident, Owen Electric owned the facilities in question.

12. At the time of the incident, Peters was an employee of Richardson Contracting and was performing work in the scope of his employment. This work was also in the scope of the August 23, 1990 construction contract between Richardson Contracting and Owen Electric.

13. Owen Electric's safety rules, as of September 25, 1992, prohibited Owen Electric employees from touching or working on any exposed energized lines or apparatus except when wearing approved protective equipment for the voltage to be contacted.

14. Owen Electric's safety rules, as of September 25, 1992, required Owen Electric employees to:

a. cover all energized and grounded conductors or guy wires within reach of any part of their body with rubber protective equipment when working on or near energized lines.

b. place protective equipment on before entering the working area within which an energized line or apparatus may be reached and continue wearing such equipment until leaving this work area.

c. place on rubber gloves before coming within falling or reaching distance of unprotected energized circuits or apparatus.

d. wear rubber gloves with leather protection when working on or within falling or reaching distance of conductors, electrical equipment, or metal surfaces which are not effectively grounded or which may be or become energized.

15. At the time of the incident, Richardson Contracting and Peters knew the requirements of the National Electrical Safety Code.

CONCLUSIONS OF LAW

The Commission makes the following conclusions of laws:

1. Owen Electric is a utility subject to Commission jurisdiction. KRS 278.010(3)(a) and 279.210.

2. KRS 278.030(2) provides that "[e]very utility shall furnish adequate, efficient and reasonable service" The delivery of safe service is synonymous with "adequate" and "reasonable" service.

3. KRS 278.280(2) authorizes the Commission to prescribe rules for the furnishing of electric service. Pursuant to this statute, the Commission promulgated Commission Regulation 807 KAR 5:041, Section 3, which requires an electric utility to construct and maintain its plant and facilities in accordance with the NESC (1990 ed.). This duty may not be delegated. It runs with the ownership of the utility plant and facilities, not with who performs the actual work.

4. National Electrical Safety Code (NESC) Section 420 (420H) requires the use of personal protective equipment, the protective devices, and the special tools provided for work.

5. National Electrical Safety Code (NESC) Section 421 (421A) requires a first level supervisor or person to, inter alia, adopt such precautions as are within his authority to prevent accidents and to see the safety rules and operating procedures are observed by those under his direction.

6. Peters' failure to wear protecting equipment while working near the 7200 volt single phase line is a violation of NESC Section 420 (420H).

7. The Richardson Contracting supervisor at the incident site failed to performed his duties as first line supervisor and thus violated NESC Section 421 (421A).

8. Owen Electric failed to comply with the NESC when constructing and maintaining its plant and facilities at the incident site.

9. The actions of Peters and Richardson Contracting were intentional and thus their conduct was willfull.

10. At the time of the incident, Peters and his supervisor were acting for Owen Electric and within the scope of their employment.

11. Based upon the principle of imputed liability contained in KRS 278.990(1), Owen Electric willfully violated Commission Regulation 807 KAR 5:041, Section 3, by failing to comply with NESC standards while constructing and maintaining its plant and equipment. For its failure to comply with Commission Regulation 807 KAR 5:041, Section 3, Owen Electric should be assessed a penalty of \$500.

12. Commission Regulation 807 KAR 5:006, Section 24, requires a utility to "adopt and execute a safety program appropriate to its size and type of operations." A utility fails to "execute" its safety program when it fails to enforce the safety rules which it has established.⁷

13. The record fails to show that Owen Electric willfully failed to enforce its safety rules during the time of the incident.

IT IS THEREFORE ORDERED that:

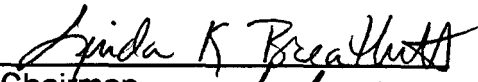
1. Owen Electric's Motion to Dismiss is denied.
2. A penalty in the amount of \$500 is assessed against Owen Electric for its willfull failure to comply with Commission Regulation 807 KAR 5:041, Section 3.

⁷ Case No. 94-013, Jackson Purchase Electric Cooperative Corporation, Inc. - Alleged Violation of Commission Regulations 807 KAR 5:006 and 807 KAR 5:041, slip op. at 3 (Jun. 19, 1995).

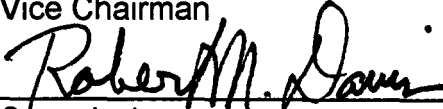
3. Owen Electric shall pay the assessed penalty within 20 days of the date of this Order by certified or cashier's check made payable to "Treasurer, Commonwealth of Kentucky." This check shall be delivered to Office of General Counsel, Public Service Commission of Kentucky, 730 Schenkel Lane, P. O. Box 615, Frankfort, Kentucky, 40602.

Done at Frankfort, Kentucky, this 18th day of September, 1996.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director